United Nations A/CN.4/561/Add.2

General Assembly

Distr.: General
12 April 2006

Original: English

International Law Commission
Fifty-eighth session
Geneva, 1 May-9 June and
3 July-11 August 2006

Diplomatic protection

Comments and observations received from Governments

Addendum

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II. Comments and observations received from Governments

General remarks

Italy

The Government of Italy congratulates the International Law Commission for its work, and endorses the approach adopted by the Commission in formulating the draft articles.

Part one. General provisions

Draft article 1 — Definition and scope

The Government of Italy believes that draft article 1, in giving a definition of the concept of "diplomatic protection" and of its scope of application, adopts a wording which is too traditional, especially when it speaks of a State "adopting in its own right the cause of its national". The wording implies not only that the right of diplomatic protection belongs only to the State exercising such protection, but also that the right that has been violated by the internationally wrongful act belongs only to the same State. However, the latter concept is no longer accurate in current international law. The International Court of Justice, in the *LaGrand* case[1] and in *Avena and other Mexican Nationals* (*Avena*),[2] has established that the breach of international norms on treatment of aliens may produce both the violation of a right of the national State and the violation of a right of the individual. The same conclusion has been reached by the Inter-American Court of Human Rights, in its Advisory Opinion OC-16/99.[3]

Therefore the Government suggests that draft article 1 be modified in order to codify more clearly current international law. The new wording (which has been extracted from the *Avena* case, para. 40) could be the following:

> Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State claiming to have suffered the violation of its own rights and the rights of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

One should note that this wording leaves unchanged the basic concept according to which the right to exercise diplomatic protection belongs to the State.

Draft article 2 — Right to exercise diplomatic protection

The Government of Italy believes that the exercise of diplomatic protection is, as a rule, a right that belongs only to the State and that international law does not provide either for a right of the injured individual to obtain diplomatic protection from its State or for a corresponding duty upon that State. However, an exception to that rule would be appropriate in some particular and very limited circumstances,

[1] 2001 *I.C.J. Reports*, p. 466, para. 77.
[2] 43 *I.L.M.*, 2004, p. 581, para. 40.
[3] Series A, No. 16 (1999), paras. 80-84.

from the perspective of the progressive development of international law, when the protection of fundamental values pertaining to the dignity of the human being and recognized by the international community as a whole is at stake.

Special Rapporteur John Dugard, following the above approach, provided for a similar exception in cases of breach of *jus cogens* norms. By contrast, the Government of Italy maintains that a more precise and more limited exception should be included in draft article 2 under the following conditions: (a) in the case of grave violations of fundamental human rights and, more precisely, with respect to the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and the prohibition of racial discrimination; and (b) if, in addition, following those violations it is impossible for the individual victim to resort to international judicial or quasi-judicial organs able to afford reparation. When the two cumulative conditions are present, the national State should have the duty to exercise diplomatic protection in favour of the injured individual and the subsidiary duty to provide, in favour of the individual, for an effective domestic remedy against its own refusal.

In the above-mentioned exceptional circumstances, the fact that certain international primary rules on human rights (which surely have the nature of *jus cogens*) also confer individual rights and the fact that their breach (which entails a very serious form of State responsibility) also violates individual rights cannot but have an impact on the secondary rules concerning diplomatic protection, by affecting the relationship between the national State and the injured individual. One should also consider the fact that, in those exceptional and residuary circumstances, diplomatic protection is the only remedy available for the individual, so that its denial by the national State would impair those fundamental principles on the dignity of the human being that the entire international community strongly intends to protect.

Therefore, the Government suggests that two paragraphs be added to article 2, which could be worded in the following way:

> 2. Notwithstanding paragraph 1, a State has a legal duty to exercise diplomatic protection on behalf of the injured person upon request:
>
> (a) If the injury results from a grave breach, attributable to another State, of an international obligation of essential importance for safeguarding the human being, such as protection of the right to life, the prohibition of torture or of inhumane or degrading treatment or punishment, and the prohibition of slavery and racial discrimination.
>
> (b) If, in addition, the injured person is unable to bring a claim for such an injury before a competent international court or tribunal or quasi-judicial authority.
>
> 3. In the cases set out in paragraph 2, States are obliged to provide in their municipal law for the enforcement of the individual right to diplomatic protection before a competent domestic court or other independent national authority.

Part two. Nationality

Chapter II. Natural persons

Draft article 7 — Multiple nationality and claim against a State of nationality

The Government of Italy, with regard to the possibility of a State exercising diplomatic protection against another State, suggests the reintroduction of the genuine link criterion instead of that of the predominant nationality. The genuine and effective link criterion appears more in conformity with the elements outlined by the international jurisprudence.[4]

For the above reasons, the Government suggests that the final text of draft article 7 could be the following:

> A State of nationality may exercise diplomatic protection in respect of a person against a State of which that person is also a national if there is a genuine link between that person and the former State, both at the time of the injury and at the date of the official presentation of the claim.

Chapter III. Legal persons

Draft article 9 — State of nationality of a corporation

The Government of Italy doubts that the granting of nationality to a corporation for the purposes of diplomatic protection should be subject both to the place of incorporation and to the place of the registered office (*siège social*, in the French text) or to the place of its management or some similar connection. It is true that the decision of the International Court of Justice in the *Barcelona Traction* case[5] — a decision that is the unique precedent the Commission refers to — takes into account simultaneously the two connecting factors. However, the Court was dealing with a case wherein the two connecting factors coincided in fact. Moreover, the Court also held that "in the particular field of the diplomatic protection of corporate entities, no absolute text of the 'genuine link' has found general acceptance". Aside from *Barcelona Traction*, what worries the Government is the case wherein a corporation is incorporated in one State and then transfers its registered office or management office to another State. The case is not a theoretical one. For instance, article 8 of Council of the European Union Regulation of 8 October 2001, (EC) No. 2157/2001, on the statute for a European company, deals exactly with such a case. It is difficult to imagine what the Court would have decided in 1970 should it have been confronted with a corporation availing itself of the possibilities addressed by article 8 of the European Community Regulation!

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[4] See the decision of the International Court of Justice of 6 April 1955 in the *Nottebohm* case, *I.C.J.*, 1955, pp. 25-26; the decision of the Italian-United States Conciliation Commission in the *Mergé claim*, in *I.L.R.*, 1955, p. 455; and the awards of the Iran-United States Claims Tribunal of 29 March 1983 in case No. 157, *Nasser Esphahanian v. Bank Tejarat*, in *I.U.C.T.R.*, 1984, vol. 2, p. 166 ff. and in case No. 211, *Ataollah Golpira v. The Government of the Islamic Republic of Iran*, ibid., pp. 174-175 respectively.

[5] *I.C.J. Reports*, 1970, para. 70.

There is no doubt that if the incorporation takes place in a State different from the one to which the corporation is attached on the basis of the other connecting factors envisaged by draft article 9, the simultaneous application of the criterion of the State of incorporation and the other criteria results in the lack of any diplomatic protection. From the comments to draft article 9, it is not clear to what extent the Commission has considered this possibility. In any case, the Government suggests that, in order to fill such gap, draft article 9 should not consider the place of incorporation for the purpose of diplomatic protection; rather, one among the other connecting factors envisaged by draft article 9 should be considered. Although this may lead to a situation in which more than one State is considered for the purpose of diplomatic protection, it should be preferred to one in which no State can be considered as the State of nationality. Obviously, coordination among different States of nationality could be achieved by applying the criteria envisaged by draft article 6 for natural persons.

Part three. Local remedies

Draft article 16 — Exceptions to the local remedies rule

Subparagraph (a)

The Government of Italy believes that the first exception to the local remedies rule, which is also the most important one, is phrased too summarily and restrictively.

Firstly, one should consider that international practice and case-law have, over time, developed a series of exceptions, namely the "non-existence", "inaccessibility", "ineffectiveness" and "inadequacy" of local remedies. They are four specific, precise and autonomous concepts, and it is very difficult to take account of all of them within the so-called criterion of the "futility rule" or within a similar criterion, such as that used by draft article 16, subparagraph (a), of the draft ("no reasonable possibility of effective redress"). Actually, the wording in subparagraph (a) does not include all the above-mentioned exceptions but rather deals with a slightly different problem: that is, to find the most suitable test or interpretative criterion to concretely evaluate, each time, the futility of local remedies, especially from the point of view of their ineffectiveness. Therefore, the wording of subparagraph (a) is too vague, uncertain and generic, and it risks not covering all the above-mentioned exceptions, to the detriment of the individual victim. The Government suggests modifying subparagraph (a) in the following way:

> (a) The local remedies are inexistent or inaccessible or ineffective or inadequate.

Secondly, if the International Law Commission does not accept the above-mentioned suggestion and prefers to maintain a single and comprehensive expression, the Government believes that the present wording of subparagraph (a) is too restrictive, considering the most recent developments of the local remedies rule not only in the field of diplomatic protection in the strict sense but also in the field of human rights. In fact, practice is moving towards a more flexible interpretative criterion, which would be better expressed by the wording: "the local remedies offer no reasonable prospect of success". This wording had been taken into consideration,

but then unfortunately rejected, by Special Rapporteur Dugard. However, the Government is of the view that the present wording of subparagraph (a) goes against the trend of international practice and risks making more rigid, and less favourable to individuals, the future application of the local remedies rule.

Subparagraph (b)

The Government of Italy believes that not only undue delay in the remedial process but also the denial of justice itself should be included in subparagraph (b). In fact, international practice shows that there is an exception to the local remedies rule when (at any stage during the remedial process) local courts refuse to render justice[6] or do not have the necessary independence,[7] or give a manifestly unjust judgment or a *mala fide* judgment, or violate the fundamental procedural rights of the individual.[8] By contrast, the exception of denial of justice cannot be easily inferred from subparagraph (a) of article 16. Therefore, subparagraph (b) should be modified in the following way:

> (b) There has been a denial of justice or there is undue delay in the remedial process which is attributable to the State alleged to be responsible.

Subparagraph (c)

The Government of Italy thinks that the provision in subparagraph (c) should be separated into two different paragraphs, since it deals with two different exceptions to the local remedies rule: (a) "there is no relevant connection between the injured person and the State alleged to be responsible"; and (b) "the circumstances of the case ... make the exhaustion of local remedies unreasonable". There are no meaningful connections between the two exceptions. Moreover, according to the present wording, it is not clear whether the lack of relevant connections works by itself as an exception, or whether it works only when it makes unreasonable the exhaustion of local remedies (as one could perhaps infer from paragraph (7) of the commentary to draft article 16).

That being said, the Government believes that the second above-mentioned exception (that relating to the circumstances of the case) should be phrased in a more extensive and, at the same time, more precise way, both by explicitly adopting the well-known terminology of "special circumstances" and by expressly listing in draft article 16 (or at least in the commentary) the most important "special circumstances" that can be inferred from international practice.

The terminology of "special circumstances" can be found in the practice existing in the field of diplomatic protection in a strict sense and even more often in the field of human rights. Moreover, the practice of both fields allows one to single out the main special circumstances, of an objective and a subjective character, which makes it extremely difficult for the injured individual to exhaust local remedies. They are (a) serious and objective difficulties of practical or spatial

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[6] *Cotesworth and Powell* case, in A. de Lapradelle and A. Politis, *Recueil des arbitrages internationaux*, III, p. 726.

[7] *Robert E. Brown* claim, 6 *U.N.R.I.A.A.*, p. 124 ff.; *Don Pacifico* case, J. B. Moore, 6 *Digest*, p. 853; *Panevezys-Saldutiskis Railway* case, *P.C.I.J.*, Series C, No. 86, p. 195; case concerning the *Aerial Incident of 27 July 1955*, *I.C.J. Pleadings*, 1959, p. 327.

[8] *Salem* case, 2 *U.N.R.I.A.A.*, p. 1202; *B. E. Chattin v. United Mexican States*, 4 *U.N.R.I.A.A.*, p. 288 ff.

character;[9] (b) situations of danger, risks of reprisals or serious damages and exorbitant judicial costs;[10] (c) general conditions of disfunctioning of the system of administration of justice or of instability of the whole governmental machinery;[11] (d) unlawful legislative measures or administrative practices;[12] and (e) situations of grave and systematic human rights violations.[13] The last three circumstances are the most important and relevant in recent practice.

However, the Government notes that draft article 16, subparagraph (c), as it is presently phrased gives only a marginal and residual importance to this exception. This is confirmed also by the commentary, which is very concise and which, by citing as examples only a few circumstances, neglects the most important ones.

Instead, the Government assigns great importance to this exception and believes that the insertion in the draft of an explicit and autonomous exception concerning the "special circumstances", followed by an exemplifying list that also takes into account the recent practice in the field of human rights, would make a remarkable contribution to the progressive development of international law with regard to the exceptions to the local remedies rule.

Part four. Miscellaneous provisions

Draft article 17 — Actions or procedures other than diplomatic protection

The article includes a saving clause allowing the State, or the person to be protected, to resort to actions or procedures other than diplomatic protection under international law. The commentary (paragraph (4)) reports, among such procedures, those envisaged in the various international conventions on human rights, or those aimed at creating mechanisms to protect investments. Also in the commentary (paragraph (6), last sentence), the Commission warns that even in the case in which the State avails itself of an alternative procedure, it will still be able to exert its right to the diplomatic protection of its national.

The Government of Italy underlines the importance of the last part of paragraph 6 of the commentary. However, its opinion is that such part can be improved and made more specific and that the specification should be included in the text of draft article 17. Indeed, when an alternative procedure — whether resorted to by the State or by the individual to be protected — entails a binding decision adopted by a fully independent and impartial judge, the right to exert diplomatic protection should no longer exist. There should be no ground to exert the

[9] *Carmalt*, in A. de Lapradelle and A. Politis, *Recueil des arbitrages internationaux*, III, p. 126; *Perry*, ibid., p. 127; *Nottebohm*, 1 *I.C.J. Pleadings*, p. 416.

[10] *Neptune*, in A. de Lapradelle and A. Politis, *Recueil des arbitrages internationaux*, I, p. 139 ff.; *Nottebohm*, 1 *I.C.J. Pleadings*, p. 408.

[11] *Akdivar*, ECHR, *Reports of Judgments and Decisions* 1996-IV, para. 69; *Aksoy*, ibid., paras. 52-57; *Godinez Cruz* case, IACHR, Series C, No. 5, para. 58; and others.

[12] *Donnelly*, ECHR, CD, vol. 43, p. 146; *Akdivar*, op. cit., para. 67; *Velásquez Rodriguez*, IACHR, Series C, No. 4, para. 68; and others.

[13] *Barbato v. Uruguay* (84/1981), *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40* (A/38/40), annex IX; *Free Legal Assistance Group*, Afr.CHRPR, *I.H.R.R.* 1997, p. 92; *Amnesty International*, ibid., 2001, p. 261; and others.

diplomatic action in such a case, since the action undertaken warrants a more secure elimination of the consequences of any wrongful act that might have been committed. Such outcome would not arise when the alternative procedure is undertaken before an institution (for instance the Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights) that is not competent to make binding decisions. In this case, the State cannot be forced to give up its right to exert diplomatic protection, given that the offending State, whose offence has been ascertained by the institution, is not obliged to comply with such decision nor suffer its consequences.

Therefore the Government suggests that an approach be adopted in draft article 17 allowing for diplomatic protection and alternative procedures to be coordinated on the basis of the aforementioned criterion. The Government is aware that the Commission has rejected a proposal of one of its members aimed at considering remedies on human rights matters as being *lex specialis* with respect to the rules on diplomatic protection (see commentary, para. (7)), and acknowledges that in reference to any alternative remedy, such a proposal would certainly be excessive. However, the Italian Government considers such a proposal more than reasonable if it refers only to the above-mentioned narrower category of jurisdictional remedies.